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Supreme Court, U.S.
FILED

No. ——— 07-674 JUL 16 2007

OFFICE OF THE CLERK

In The

# Supreme Court of the United States

FRANK SUAREZ, JR.,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Mr. Suarez was given a guideline sentence based on facts not admitted by him nor proved to a jury beyond a reasonable doubt. That sentence was above the ceiling of the sentencing range applicable under the mandatory federal sentencing guidelines system then in effect and was based on judicial fact-finding by a preponderance of the evidence. The case originated in the United States District Court for the Southern District of Texas and this sentence became final before *Blakely v. Washington*:

1. Is the holding in *Blakely* a new rule?

2. If *Blakely* is a new rule, does its requirement that facts resulting in an enhanced statutory maximum be proved beyond a reasonable doubt or admitted by the defendant apply retroactively?

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## PETITION FOR A WRIT OF CERTIORARI

Frank Suarez, Jr., petitions for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in this case.

## OPINION BELOW

The Memorandum and Disposition of the United States Court of Appeals for the Fifth Circuit, which was filed on April 17, 2007, is unpublished and reproduced at App. 1. The decision of the United States District Court for the Southern District of Texas is unpublished and is reproduced at App. 3.

## JURISDICTION

The Fifth Circuit issued its opinion denying Mr. Suarez' Petition for a Certificate of Appealability on April 17, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a

Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law. . . . "

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . . "

## STATEMENT OF THE CASE

1. On October 3, 1994, Mr. Suarez pleaded guilty to conspiracy to possess with the intent to distribute more than five kilograms of cocaine (Count I) of a two-count Indictment in violation of 21 U.S.C. § 841 and 846. At sentencing, the government dismissed the second count.

When Mr. Suarez was sentenced on December 16, 1994, the district court calculated the then-mandatory sentencing guidelines range to be 360 months to life, based on facts not proved to a jury nor admitted by Mr. Suarez. Indeed, Mr. Suarez disputed at least two of the enhancements imposed by the district court and challenged the underlying facts used by the court in determining the enhancements. At sentencing, the district court made various findings of fact by a preponderance of the evidence, as to factors that were not alleged in the Indictment. First, the Court held Mr. Suarez liable for more thank 150 kilograms of cocaine resulting in an offense level 38. Over objection of the defendant, the Court also found that the defendant was subject to a four-level upward adjustment as a leader or organizer of the offense and

a criminal history category of IV, which included a conviction that Mr. Suarez claimed was too old to be counted because he had been released from prison more than 15 years before the start of the charged conspiracy. Relying on information found in unsworn records maintained by the National Criminal Information Center, the district court found by a preponderance of the evidence that Mr. Suarez' release from prison had been two months earlier than Mr. Suarez claimed and therefore his prior conviction counted under the criminal history guideline. The court also granted a two-level, rather than a three-level, downward adjustment for acceptance of responsibility.

Without these disputed findings, the sentencing range would have been 235 to 293 months.[1]

2. Mr. Suarez appealed his sentence to the United States Court of Appeals for the Fifth Circuit on January 17, 1995. That court ultimately dismissed the appeal on August 25, 1995, for want of prosecution after his counsel failed to pay the filing fee.

3. On June 24, 2005, within one year after this Court decided *Blakely v. Washington*, 542 U.S. 296 (2004), Mr. Suarez filed a petition pursuant to 28 U.S.C. § 2255 arguing that his sentence, which exceeded the sentence that could be imposed solely on the facts proved to a jury beyond a reasonable doubt or admitted by him, was imposed in violation of rights

[1] Had the district court granted the extra level for timely acceptance of responsibility, his sentencing range would have been even lower, 210 to 262 months.

guaranteed him under the Fifth and Sixth Amendments to the United States Constitution.[2] He also argued that he was factually innocent of the criminal history category and role in the offense, which the district court had found to enhance his sentence. The district court denied Mr. Suarez' § 2255 petition and also denied a certificate of appealability finding that his petition was time-barred because it was filed more than one year after his conviction became final and that *Blakely* was not retroactive. This was Mr. Suarez' first and only § 2255 petition.

4. Mr. Suarez sought a certificate of appealability on his *Blakely* claim. The Fifth Circuit denied this request as time-barred based on the fact that it was filed more than one year after his sentence became final. *See* Memorandum Order, App. 1a.

## REASONS FOR GRANTING THE PETITION

This Court has held that under the doctrine set forth in *Teague v. Lane*, 489 U.S. 288 (1989), new procedural rules do not apply retroactively unless they fall into one of two exceptions. *See Beard v. Banks*, 542 U.S. 406, 411 (2004). The lower courts

[2] Mr. Suarez also alleged that his counsel rendered ineffective assistance of counsel for providing him materially incorrect advice about the sentence he was facing under the guidelines if he pleaded guilty, telling him that he faced a maximum of 17 years and would likely be sentenced to a term of between 12 to 14 years. He also failed to present various arguments for downward departures under the guidelines.

decision that *Blakely* is a new rule contravenes this Court's precedent. If this Court decides *Blakely* is a new rule, it should address the important issue of whether *Blakely* applies retroactively and conclude that it does.

### A. The Decision Below Contravenes This Court's Precedent

The Fifth Circuit has held that *Blakely* announced a new rule. *See United States v. Gentry*, 432 F.3d 600, 603 (5th Cir. 2005) (holding *United States v. Booker*, 543 U.S. 220 (2005), which extended the rule of *Blakely* to the federal sentencing guidelines announced a new rule). The articulated rationale for the Fifth Circuit's conclusion is that the rule "was not dictated by precedent existing at the time." *Gentry*, 432 F.3d at 604. In reaching this conclusion, the Fifth Circuit explained that "the fact that the entire federal judiciary had been so deeply at odds over the issue of whether the rule announced in *Blakely* applied to the Guidelines is also probative of the fact that *Booker* announced a new rule." *Gentry*, 432 F.3d at 604.

The Tenth Circuit has also held that *Blakely* announced a new rule. Addressing the application of *Blakely* to a petitioner sentenced under the federal sentencing guidelines, the Tenth Circuit reasoned that before *Blakely*, the circuit courts had held that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), did not apply to judge-determined facts that resulted in a sentence below the statutory maximum and that it was not until *Blakely* that the "Supreme Court

clarified that 'the *statutory maximum* for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*'" *United States v. Price*, 400 F.3d 844, 847 (10th Cir. 2005) (quoting *Blakely*). The Eleventh Circuit has also held that *Blakely* is not retroactively applicable to cases on collateral review. *Varela v. United States*, 400 F.3d 864, 867-68 (11th Cir. 2005). However, *Varela* addressed only the fact-finder aspect of *Blakely* and did not address whether the retroactivity of the requirement that findings be made beyond a reasonable doubt. The Seventh Circuit has expressly held that *Blakely* "was not dictated or compelled by *Apprendi* or its progeny." *Simpson v. United States*, 376 F.3d 679, 681 (7th Cir. 2004).

The decision of the Fifth Circuit and other circuit courts that the holding in *Blakely* is a "new rule" ignores this Court's analysis in both *Blakely* and *United States v. Booker*, 543 U.S. 220 (2005) which, while not expressly addressing the issue, make clear that the holding in *Blakely* is not a new rule, and contravenes this Court's precedent on the definition of a new rule.

A straightforward application of *Apprendi* was all that was necessary to decide *Blakely*. *See* Kate Stith, *Crime and Punishment Under the Constitution*, 2004 SUP. CT. REV. 221, 252-55 (2005) (*Apprendi* "foreordained" the result in *Blakely*; "[a]ll the Court had to do to decide *Blakely* was to apply the rule exactly as *Apprendi* had stated it"); R. Craig Green, *Apprendi's Limits*, 39 U. RICH. L. REV. 1155, 1169-82 (2005) ("the

Court simply restated and applied *Apprendi's* rule" in an "identical" manner).

*Apprendi* involved two statutorily established sentencing thresholds: one for committing the crime without racial motivation, and one for committing that class of crime with a racial motivation. This Court ruled that the "statutory maximum" was the maximum statutory sentence the defendant could receive "if punished according to the facts in the jury verdict alone." *Apprendi*, 530 U.S. at 483; *see also Apprendi,* 530 U.S. at 469.

In *Blakely*, this Court again addressed the situation involving two statutorily established thresholds – one for committing the crime without exceptional circumstances – and using almost verbatim language from *Apprendi*, held that its "precedents make clear" that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" 542 U.S. at 303. This Court continued: "The 'maximum sentence' is *no more* [the outer limit for the class of felony] here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime). . . ." 542 U.S. at 304.

Neither the *Blakely* majority nor any of the dissenters even hinted that holding in *Blakely* broke any new ground; the disagreement between the majority and the dissenters was on the merits of the *Apprendi* decision itself, not whether *Apprendi* dictated the result in *Blakely*. *See e.g., Blakely,* 542 U.S.

at 306 ("Those who would reject *Apprendi* are resigned to one of two alternatives."); *id.* at 310 (rebutting argument "that *Apprendi* works to the detriment of criminal defendants who plead guilty"); *id.* at 328 (Breyer, J., dissenting) ("the Court makes clear that it means what it said in *Apprendi.*"). *Compare with Banks*, 542 U.S. at 415 (relying on the existence of dissenting opinions in *Mills v. Maryland*, 486 U.S. 367 (1988) to support argument that *Lockett v. Ohio*, 438 U.S. 586 (1978) did not compel the result in *Mills* where the very reason for the dissent in *Mills* was the argument that the *Lockett* principle did not compel the result in *Mills*).

The *Blakely* decision startled many observers and has had a substantial impact on state sentencing systems. It rendered portions of Washington's and other states' determinate sentencing systems invalid. But the most that can be said of this outcome is, as Justice Breyer put it, that "[t]he Court [made] clear that it mean[t] what it said in *Apprendi.*" *Blakely*, 542 U.S. at 328 (Breyer, J., dissenting).

Making clear that a prior opinion meant what it said does not announce a new rule. The new rule must "break[] new ground" in some way necessary to its holding. *Graham v. Collins*, 506 U.S. 461, 467 (1993). Because the holding in *Blakely* "was *dictated* by then-existing precedent" it was not a new rule. *Banks*, 542 U.S. at 413.

## B. This Court Should Resolve the Important Issue of Whether *Blakely* Applies Retroactively If It Is a New Rule

If *Blakely* is a new rule, its requirement that facts resulting in enhanced maximums must be proved beyond a reasonable doubt applies retroactively to cases such as Mr. Suarez' where the sentence was based on contested facts proved only by a preponderance of the evidence. This Court has already held, in a combination of decisions, that rules related to the reasonable doubt standard apply retroactively. In addition, under the *Teague* test, reasonable doubt is a fundamental interest of transcending value necessary to the accuracy of criminal proceedings.

### 1. Through a Combination of Cases, This Court Has Already Made *Blakely* Retroactive

In *Tyler v. Cain*, 533 U.S. 656, 666 (2001), this Court held that a new rule may be made retroactive through a series of Supreme Court cases. In concurrence, Justice O'Connor expounded:

> This Court instead may "ma[k]e" a new rule retroactive through multiple holdings that logically dictate the retroactivity of the new rule. . . . [I]f we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the

> given rule applies retroactively to cases on collateral review.

*Tyler*, 533 U.S. at 668-69 (O'Connor, J., concurring). The rule in *Blakely* is precisely this type of rule.

This Court held that its decisions in *In re Winship*, 397 U.S. 358 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975) apply retroactively because of the role of the reasonable doubt standard in assuring that punishment is only inflicted on the guilty. *See Hankerson v. North Carolina*, 432 U.S. 233, 240 (1977); *Ivan V. v. City of New York*, 407 U.S. 203, 204-05 (1972).

In *Ivan V.*, this Court gave the rule announced in *Winship* retroactive effect because "the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function." 407 U.S. at 205. In *Hankerson*, the Court relied on *Ivan V.* to apply *Mullaney* retroactively because the "rule was designed to diminish the probability that an innocent person would be convicted and thus to overcome an aspect of a criminal trial that 'substantially impairs the truth-finding function.'" *Hankerson*, 432 U.S. at 242.

For the same reasons that *Ivan V.* controlled the retroactivity analysis in *Hankerson*, *Ivan V.* and *Hankerson* control the analysis here. *Blakely* is the precise example of a situation in which retroactivity

is "necessarily dictate[d]" by an earlier decision of the Supreme Court. *Tyler*, 533 U.S. at 666.

### 2. If *Blakely* Announced a New Rule, its Requirement of Proof Beyond a Reasonable Doubt Is a Watershed Rule of Constitutional Procedure That Should Be Applied Retroactively Under the *Teague* Rule on Retroactivity

Under the second exception to the rule against the retroactive application of new constitutional rules, a rule applies retroactively "if it requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty."'" *See Teague*, 489 U.S. at 307. Such a rule vindicates two discrete concerns: the fundamental fairness of the underlying proceeding; and the accuracy of that underlying criminal proceeding. *See Saffle v. Parks*, 494 U.S. 484, 495 (1990).

The reasonable doubt prong of *Blakely* is precisely the type of rule covered by *Teague's* second exception. *See generally Rethinking Retroactivity*, 118 HARV. L. REV. 1642 (2005) (tracing roots of accuracy as requiring retroactivity and opining that *Apprendi* should apply retroactively). This Court's decision in *Schriro v. Summerlin*, 542 U.S. 348 (2004), demonstrates that the reasonable doubt standard is both fundamental and necessary to accuracy in criminal cases.

In *Schriro*, this Court concluded that the decision in *Ring v. Arizona*, 536 U.S. 584 (2002), which applied *Apprendi* to Arizona's capital sentencing scheme, does not apply retroactively under *Teague*. The Court reiterated *Teague's* second exception for rules "implicating the fundamental fairness and accuracy of the criminal proceeding." *Schriro*, 542 U.S. at 532. "That a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conviction is *seriously* diminished.'" *Id.* (quoting *Teague*, 489 U.S. at 313). Under this analysis, the Court rejected the Ninth Circuit's conclusion that *Ring* fell within the second *Teague* exception, concluding that judicial fact-finding under a reasonable doubt standard was not shown to "seriously diminish" the accuracy of the sentencing. *Id.* at 356.

In *Schriro*, this Court also recognized the fundamental role that the reasonable doubt standard plays in assuring accuracy in criminal proceedings. The Court did not question whether *Apprendi* rights were "fundamental." *Schriro*, 542 U.S. at 358. The question became whether the difference between judicial and jury factfinders jeopardized the accuracy of convictions sufficiently to require retroactive application of the new rule. The jury trial right only applied prospectively because judicial fact-finding beyond a reasonable doubt adequately protected accuracy. Under a preponderance standard, accuracy is not protected to the same extent. *See also Cage v. Louisiana*, 498 U.S. 39, 39-40 (1990) (reasonable doubt "is a

prime instrument for reducing the risk of convictions resting on factual error."). Indeed, the reasonable doubt standard "plays a vital role in the American scheme of criminal procedure." *Winship*, 397 U.S. at 363.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

DATED this 16th day of July 2007.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 06-20581
USDC No. 4:05-CV-2207
USDC No. 4:94-CR-143-1

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANK SUAREZ, also known as Leonides Suarez,

Defendant-Appellant.

- - - - - - - - - - - - - - - - -

Appeal from the United States District Court
for the Southern District of Texas

- - - - - - - - - - - - - - - - -

(Filed Apr. 17, 2007)

ORDER:

Frank Suarez, federal prisoner # 35257-004, moves for a certificate of appealability (COA) to appeal from the district court's dismissal with prejudice of his 28 U.S.C. § 2255 motion as time-barred, pursuant to 28 U.S.C. § 2244(d). Suarez is serving a 360-month sentence on a guilty plea conviction for conspiracy to possess with intent to distribute five kilograms or more of cocaine. Suarez argues that he is entitled to tolling of the § 2244(d) limitations period because he filed his § 2255 motion within one year of the *Blakely v. Washington,* 542 U.S. 296

(2004), decision and because he is actually innocent of the sentencing enhancements based on his leadership role in the offense and his criminal history.

When the district court's denial of collateral relief is based on procedural grounds, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the [§ 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

Suarez has not shown that jurists of reason would find it debatable whether the district court was correct in dismissing his § 2255 motion as time-barred. *See id.* Suarez's COA motion therefore is DENIED.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTH
UNITED STATES
CIRCUIT JUDGE

**A true copy**
**Attest:**

**Clerk, U. S. Court of Appeals,**
**Fifth Circuit**

**By** /s/ Jim de Montluzin
**Deputy**
**New Orleans, Louisiana**

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | § | |
| | § | |
| Plaintiff-Respondent, | § | CRIMINAL ACTION |
| | § | NO. H-94-143 |
| v. | § | CIVIL ACTION |
| FRANK SUAREZ, | § | NO. H-05-2207 |
| | § | |
| Defendant-Movant. | § | |

**ORDER AMENDING AND ADOPTING RECOMMENDATION OF THE MAGISTRATE JUDGE**

Pending is the Government's Answer, Motion to Dismiss and Motion for Summary Judgment (Document Nos. 256, 257, 258), and Frank Suarez's 28 U.S.C. § 2255 Motion to Vacate, Set Aside or Correct Sentence (Document No. 251). The Court has received from the Magistrate Judge a Memorandum and Recommendation recommending that the Government's Motion to Dismiss be GRANTED and that Suarez's Motion to Vacate, Set Aside or Correct Sentence be DENIED. Movant filed Objections to the Memorandum and Recommendation (Document No. 262). The Court, after having made a *de novo* determination of the Government's Answer, Motion to Dismiss and Motion for Summary Judgment, Suarez's § 2255 Motion to Vacate, Set Aside or Correct Sentence, the Magistrate Judge's Memorandum and Recommendation, and Suarez's Objections, is of the

opinion that the findings and recommendations of the Magistrate Judge should be and hereby are accepted by the Court, but with one correction: On page 4, bottom paragraph, the third sentence is amended to read as follows:

> Suarez's § 2255 motion cannot be considered timely under § 2255(4) because Suarez has not shown that the facts underlying his claims could not be discovered through the exercise of due diligence until less than one year before he filed this motion on June 21, 2005.

Therefore,

It is ORDERED and ADJUDGED for the reasons set forth in the Memorandum and Recommendation of the United States Magistrate Judge signed and entered on March 14, 2006, which, as amended herein, is adopted in its entirety as the opinion of the Court, that the Government's Motion to Dismiss (Document No. 257) is GRANTED, and Movant Frank Suarez's § 2255 Motion to Vacate, Set Aside or Correct Sentence (Document No. 251) is DENIED. It is further

ORDERED that a certificate of appealability is DENIED. A certificate of appealability from a habeas corpus proceeding will not issue unless the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard "includes showing that reasonable jurists could debate whether (or, for that matter, agree that)

the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel,* 120 S. Ct. 1595, 1603-1604 (2000) (internal quotations and citations omitted). Stated differently, where the claims have been dismissed on the merits, the petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 1604; *Beasley v. Johnson,* 242 F.3d 248, 263 (5th Cir.), *cert. denied,* 122 S.Ct. 329 (2001). When the claims have been dismissed on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack,* 120 S. Ct. at 1604. A district court may deny a certificate of appealability *sua sponte,* without requiring further briefing or argument. *Alexander v. Johnson,* 211 F.3d 895, 898 (5th Cir. 2000).

For the reasons set forth in the Memorandum and Recommendation, which has been adopted, as the opinion of the Court, the Court determines that Movant has not made a substantial showing of the denial of a constitutional right and that reasonable jurists would not debate the correctness of the limitations ruling.

The Clerk will enter this Order and send copies to all parties of record.

Signed at Houston, Texas this 25th day of April, 2006.

/s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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| UNITED STATES OF AMERICA, | § | |
| | § | |
| Plaintiff/Respondent, | § | CRIMINAL ACTION |
| | § | NO. H-94-143-1 |
| V. | § | CIVIL ACTION |
| | § | NO. 05-2207 |
| FRANK SUAREZ, | § | |
| | § | |
| Defendant/Movant. | § | |

**MEMORANDUM AND RECOMMENDATION GRANTING GOVERNMENT'S MOTION TO DISMISS**

Before the Magistrate Judge in this federal habeas corpus proceeding pursuant to 28 U.S.C. § 2255 Movant Frank Suarez' Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody and Memorandum in Support (Document Nos. 251 & 253), and the Government's Answer, Motion to Dismiss and Motion for Summary Judgment (Document Nos. 256, 257, 258). Having considered the § 2255 Motion to Vacate, Set Aside or Correct Sentence, and Memorandum in support, the Government's Answer, Motion to Dismiss, and Motion for Summary Judgment, Suarez' Reply (Document No. 260), the record of the proceedings before the District Court in the underlying criminal case, and the applicable law, the Magistrate Judge RECOMMENDS, for the reasons set forth below, that the Government's Motion to Dismiss be

GRANTED, that Suarez' § 2255 Motion to Vacate, Set Aside or Correct Sentence be DENIED, and that this § 2255 proceeding be DISMISSED with prejudice as time barred.

## I. Introduction and Procedural History

Movant Frank Suarez ("Suarez"), who is currently in the custody of the United States Bureau of Prisons, is seeking federal habeas corpus relief under 28 U.S.C. § 2255. This is Suarez' first motion pursuant to § 2255.

On June 29, 1994, Suarez was charged by indictment with conspiracy to possess with intent to distribute 5 kilograms or more of cocaine (count one), and aiding and abetting the possession with intent to distribute 5 kilograms or more of cocaine (count two). (Document No. 1). On October 3, 1994, Suarez pled guilty to count one without a plea agreement. (Document No. 62). Thereafter, on December 16, 1994, following the preparation of a presentence investigation report, to which Suarez filed objections, the District Court sentenced Suarez to 360 months confinement, to be followed by a five year term of supervised release, and a $25,000 fine. (Document No. 87). A Judgment of Conviction was entered on January 3, 1995. (Document No. 97). Suarez appealed, but his appeal was dismissed on August 22, 1995, for want of prosecution. (Document No. 122).

On or about June 21, 2005, Suarez filed his § 2255 Motion to Vacate, Set Aside or Correct Sentence (Document No. 251) and a Memorandum of Law in support (Document No. 253). In response, the Government has filed an Answer, Motion to Dismiss and Motion for Summary Judgment (Document Nos. 256, 257, 258), to which Suarez has filed a Reply in opposition (Document No. 260). This § 2255 proceeding is ripe for ruling.

## II. Claims

Suarez raises essentially two claims in this § 2255 proceeding:

1. that his sentence, which was based on facts and factors found by the District Court from a preponderance of the evidence, violates his Fifth Amendment right to due process and his Sixth Amendment right to a jury trial; and

2. that his trial counsel was ineffective for incorrectly advising him that he faced a sentencing range of 12-17 years, and that such incorrect advice rendered his guilty plea unknowing and involuntary.

## III. Discussion – Limitations

The Government argues in its Answer, Motion to Dismiss and Motion for Summary Judgment that Suarez's claims and this § 2255 proceeding are time-barred. In response, Suarez maintains that his § 2255

motion was filed within one year of the Supreme Court's decision in *Blakely v. Washington,* 542 U.S. 296 (2004) and therefore the motion is timely under § 2255(3).

28 U.S.C. § 2255 specifically provides for a one-year statute of limitations as follows:

> A 1-year,period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from filing by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255.

Here, Suarez's conviction was final on November 20, 1995, ninety days after the Fifth Circuit dismissed his appeal for want of prosecution and he failed to file a petition for writ of certiorari with the United States Supreme Court. SUP. CT. R. 13.1 ("a petition for certiorari . . . is timely when it is filed . . . within 90 days after entry of the judgment"); *Clay v. United States*, 537 U.S. 522 (2003) ("We hold that, for federal criminal defendants who do not file a petition for certiorari with this Court on direct review, § 2255's one year limitations period starts to run when the time for seeking such review expires."); *United States v. Gamble*, 208 F.3d 539 (5th Cir. 2000) (§ 2255's statute of limitations begins to run when the time for filing a petition for certiorari expires). Because Suarez' conviction became final prior to the enactment of the one-year limitations period, Suarez had until April 24, 1997, under § 2255(1), to file a timely § 2255 motion. *See United States v. Flores*, 135 F.3d 1000 (5th Cir. 1998) (holding that under § 2255(1), a § 2255 movant, whose conviction was final prior to the effective date of the AEDPA, had one year from the effective date of the AEDPA, April 24, 1997, to timely file a § 2255 motion), *cert. denied*, 525 U.S. 1091 (1999). Suarez' § 2255 motion, filed on or about June 21, 2005, is over seven years too late under § 2255(1).

As for the alternative commencement dates for the one year limitations period, provided for in § 2255(2), (3), and (4), none is applicable in this case. *Suarez'* § 2255 motion cannot be considered timely

under § 2255(2) because Suarez has not alleged that he was in any way impeded from filing his § 2255 motion. Suarez' § 2255 motion cannot be considered timely under § 2255(4) because Suarez has not shown that the facts underlying his claims could have been discovered through the exercise of due diligence by the time his conviction was final. Finally, although Suarez raises a claim premised *upon* the decisions of *Blakely* and *United States v. Booker*, 543 U.S. 220 (2005), which set forth "new rules," the Supreme Court has not made *Blakely* or *Booker* retroactive to cases on collateral review. In addition, the Fifth Circuit has held that *Blakely* and *Booker* are not to be applied retroactively to cases on collateral review. *See United States v. Gentry*, 432 F.3d 600, 603 (5th Cir. 2005). As such, Suarez' § 2255 motion cannot be considered timely under § 2255(3). *See e.g., United States v. Martinez,* 2006 WL 448837 (S.D. Tex. 2006) (Head, J.); *see also In re Elwood,* 408 F.3d 211, 213 (5th Cir. 2005) (holding that because the Supreme Court has not made *Booker* retroactive to cases on collateral review, successive § 2255 motions that are predicated on *Booker* are subject to dismissal).

In addition, while not argued by Suarez, there is no equitable basis for extending the limitations period. Rare and exceptional circumstances may warrant the application of equitable tolling principles to a late-filed habeas corpus applications [sic]. *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 199 [sic]), *cert. denied*, 526 U.S. 1074 (1999). Equitable tolling, however, is not available if the petitioner does not act

diligently in attempting to meet the one year limitations deadline. *Coleman v. Johnson,* 184 F.3d 398, 402 (5th Cir. 1999), *cert. denied*, 529 U.S. 1057 (2000). In addition, "garden variety claims of excusable neglect" will not warrant the application of equitable tolling. *Lookingbill v. Cockrell,* 293 F.3d 256, 265 (5th Cir. 2002). Upon this record, there is no basis for equitable tolling of the limitations period.

Because Suarez' § 2255 motion was not timely filed and because there are no grounds in the record for equitable tolling, the Government's Motion to Dismiss should be granted.

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